NIK CHE KOK

v.

PUBLIC BANK BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
[CIVIL APPEAL NO: W-02-438-1998]
8 MARCH 2001

LIMITATION: *Striking out action on ground of time bar - Accrual of cause of action - When time began to run - Whether from earliest date on which plaintiff could have sued defendant - Whether from first notice of demand - Whether such notice of demand must state precisely amount due and owing - Whether plaintiff's action statute-barred - Whether should be struck out under O. 18 r. 19 Rules of the High Court 1980 - Limitation Act 1953, s. 6(1)(a)*

CIVIL PROCEDURE: *Striking out - Claim - Defendant applying under O. 18 r. 19 Rules of the High Court 1980 - Whether plaintiff's claim statute-barred - Whether a fit and proper case for striking out under O. 18 r. 19 - Limitation Act 1953, s. 6(1)(a)*

The defendants' application to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC') by reason of s. 6(1)(a) of the Limitation Act 1953 ('LA53') was allowed by the senior assistant registrar ('SAR'). On appeal, the High Court reversed the decision of the SAR on the ground that there were triable issues. This was the 1st defendant's appeal to the Court of Appeal.

Held:
Per Shaik Daud Ismail JCA

[1] Although the plaintiff bank had issued three notices of demand, dated 2 April 1986, 15 May 1986 and 20 July 1993 respectively, the liabilities of the principal debtor as well as of the guarantors (of which the 1st defendant was one) arose as from the first notice of demand dated 2 April 1986. Pursuant to this first notice of demand, the plaintiff could have sued the principal debtor and the guarantors, notwithstanding the fact that the said notice did not specify the precise amount due and owing. For the purpose of limitation, time began to run from the earliest date on which

the plaintiff could have sued the 1st defendant, *ie*, 2 April 1986, which was the date on which the cause of action accrued. The plaintiff's suit against the 1st defendant which was filed on 21 June 1996 was, therefore, statute-barred by virtue of s. 6(1)(a) of the LA53.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Permohonan defendan-defendan untuk membatalkan tuntutan plaintif di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana s. 6(1)(a) Akta Penghadan 1953 ('KA53') telah dibenarkan oleh Penolong Kanan Pendaftar ('PKP'). Atas rayuan, Mahkamah Tinggi telah mengakaskan keputusan PKP atas alasan bahawa terdapatnya isu-isu yang boleh dibicarakan. Ini adalah rayuan defendan pertama kepada Mahkamah Rayuan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Meskipun bank plaintif telah mengeluarkan tiga notis tuntutan bertarikh 2 April 1986, 15 Mei 1986 dan 20 Julai 1993 masing-masingnya, tanggungan-tanggungan penghutang prinsipal dan juga penggerenti-penggerenti (yang mana defendan pertama adalah salah satu daripadanya) berbangkit bermula daripada notis tuntutan bertarikh 2 April 1986. Selaras dengan notis tuntutan yang pertama, plaintif seharusnya telah mendakwa penghutang prinsipal dan penggerenti-penggerenti tersebut, meskipun pada hakikatnya notis tersebut tidak menentukan jumlah kena bayar dan terhutang yang tepat. Bagi tujuan penghadan, masa mula beredar daripada tarikh yang paling awal di atas yang mana plaintif seharusnya boleh mendakwa defendan pertama, iaitu 2 April 1986 yang mana tarikh bilamana kausa tindakan tersebut terakru. Guaman plaintif terhadap defendan pertama yang telah difailkan pada 21 Jun 1996 adalah, dengan itu, dihalang oleh statut menurut s. 6(1)(a) LA53.

[Rayuan dibenarkan.]

Case(s) referred to:
O'day v. Commercial Bank of Australia [1993] 50 CLR 200 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a)
Rules of the High Court 1980, O. 18 r. 19

For the appellant - Loh Siew Cheang (Rajashree Suppiah & Roy Sreenivasan with him); M/s Cheang & Ariff
For the respondent - Jordon Sugunasingam; M/s Iza, Ng, Yeoh & Kit

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-3-22-283-1996]

Reported by Gan Peng Chiang

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal against the decision of the High Court, which had refused to strike out the respondent's claim against the appellant. The appellant had filed a summons in chambers before the senior assistant registrar to have the respondent's claim struck out under O. 18 r. 19 of the Rules of the High Court 1980, on the ground that the respondent's claim was statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953, ie, six years from the date the cause of action arose. The aplication was allowed but on appeal the High Court reversed the decision of the senior assistant registrar on the ground that there are triable issues and that the case is not one fit to be struck out under O. 18 r. 19.

The facts are that on 5 October 1982 the respondent approved a fixed loan of RM6 million to a company called Nik Seng Development Sdn Bhd. The appellant and two others executed a letter of guarantee dated 29 December 1982 and undertook to pay on demand.

The respondent issued a total of three demands. The first demand was made on 2 April 1986. Arising out of the first demand, the respondent sued the principal debtor ie, Nik Seng Development Sdn. Bhd. Strangely enough none of the guarantors were included in that suit. Then on 15 May 1986 the respondent issued a second demand against the principal debtor and the appellant and the other guarantors. Arising out of this second demand, the respondent filed a second suit against the appellant and two other guarantors. Some six years later the respondent withdrew the suit against the appellant and the two other guarantors without assigning any reasons for the withdrawal. On 20 July 1993 the respondent issued a third demand and consequently filed this present suit against the appellant on 21 June 1996 ie, about three years later. The issue before the court is when did time begin to run for the purpose of s. 6(1)(a) of the Limitation Act 1953. It is clear that no action founded on a contract shall be brought after the expiration of six years from the date or which the cause of action accrued. Therefore, in the circumstances of this contract when did the cause of action accrue? It is the contention of the learned counsel for the appellant that it accrued from the first notice of demand dated 2 April 1986. Therefore, as the present suit was filed on 21 June 1996 it is time-barred pursuant to s. 6(1)(a) of the Limitation Act 1953. Learned counsel for the respondent on the other hand submitted that by the first notice of demand dated 2 April 1986, the liability of the guarantor did not arise because that notice merely calls for payment of overdue interest and not a demand for the repayment of the loan.

The High Court came to the conclusion that looking at all the three alleged notices of demand, there was no sufficient evidence to show whether they are actually notices of demand under the letter of guarantee and that these had raised triable issues. Therefore, not a fit and proper case to strike out the respondent's claim.

Looking at the facts and circumstances of this case, we are of the view that the liability of the principal debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. For all intents and purposes it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as against the guarantors. Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home to the debtor that the creditor is demanding its money. (See *O'day v. Commercial Bank of Australia* [1993] 50 CLR 200). It is our view that for the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case the earliest time the respondent could have commenced a suit was soon after issuing the notice of demand of 2 April 1986. On the facts of this case, we are of the view that since the suit was filed more than six years after the cause of action accrued, the suit is statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953. In the premises we allowed the appeal with costs and ordered that the deposit be refunded to the appellant.